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ABSTRACT

Court cases dating from the 1850s and pertaining to racial integration are reviewed in this paper. The impact that judicial decisions and laws have had on civil rights and on racial integration of the schools is discussed. Cases considered include suits from various states concerning voting rights, segregation of public transportation, segregated schools, and segregated housing. Black access to higher education in the first half of this century is also considered. Specific legal mandates for school desegregation are reviewed from the time of the "Brown" decision in 1954. Reaction to court orders to integrate schools in both Northern and Southern states is described. The contemporary situation is assessed, and some predictions about the future of school desegregation are offered. (GC)

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IMPACT OF DESEGREGATION: A HISTORICAL AND LEGAL ANALYSIS

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Paper presented at the annual meeting of the American Educational Research Association (AERA), held at Toronto, Ontario, Canada, on March 27-31, 1978.

Introduction

"A segregated school cannot be considered the equivalent of a white school because of the inconvenience and the stigma of caste that mandatory attendance of it imposes on the Negro child. Public schools are by definition a place for the benefit of all classes meeting together on equal terms. Segregation injures the child who is white as well as the minority child...their hearts, while yet tender with childhood, are necessarily hardened by this conduct, and their subsequent lives, perhaps, bear enduring testimony to this legalized uncharitableness."[1]

The above arguments do not come from any recent court decision. They were stated by attorney Charles Sumner before the Massachusetts Supreme Court over 129 years ago. The impact of that case upon the public was to justify the sentiments of the times--the continuation of segregation in the Boston city schools. Later court decisions have attempted to alter public opinion toward support of a higher ideal of equality of the races before the law. The impact of a court's decision often permeates the very fabric of society itself--far beyond the boundaries established by the facts of the case. The process is continuous and self-perpetuating-- altered only by the variables of time and truth.

Socio-historical Setting

The American Civil War was fought to both preserve the Union and to free the slaves of the South. Following that war, the onslaught of Radical Reconstruction brought new reforms to the South and three new Amendments to the U.S. Constitution. The Thirteenth Amendment conferred citizenship upon the blacks in the South; the Fourteenth guaranteed them equal protection under the law; and the Fifteenth extended to them their voting rights. Civil Rights Acts were passed by Congress to augment and enforce the Amendments. Legislation and the bayonets of the Union Army were to be the tools to undo the effects which the "peculiar institution" had inflicted on the two races for over 250 years. But the Reconstructionists had failed to foresee the political pressures which society would impose upon the courts; and the withdrawal of federal troops from the South in 1877 marked the return to antebellum attitudes in both North and South. The real question was, perhaps, whether or not attitudes had ever really changed at all?

It is not enough to simply pass a law or constitutional amendment to correct a past wrong. In practice, the original intent of the law frequently gets circumvented by other laws and certain legal interpretations by the courts. A court is often asked to interpret legislation according to its understanding of the drafters' original legislative intentions. Yet courts at the same time are expected to attempt to interpret

the law in terms of current public opinion and the conditions. The conflict between these two divergent views often results in a compromise which fails to satisfy the original plaintiff, even if he has proven and won his case. Such "hollow verdicts" were common in the history of the desegration movement before 1954.

Legal History and It's Impact

The earliest attempt to desegregate schools came in the city of Boston in 1849. A five-year-old black child, Sara Roberts, was forced to attend Boston's Negro Smith Grammar School; even though in doing so she had to walk past five other elementary schools closer to her home each day. The Smith School was run-down and filled with equipment that, according to an evaluative study and committee report, "has been so shattered and neglected that it cannot be used until it is thoroughly repaired."[2] The father, unable to get his daughter enrolled in any of the nearby white schools, brought suit against the city of Boston.[3] But the eloquence of attorney Charles Sumner was in vain. Chief Justice Lemuel Shaw, while agreeing with Sumner's contention that all persons stand equal before the law, also stated that school segregation existed for the good of both races. People's rights, Shaw added, "depend upon laws adapted to their respective relations and conditions."[4]

In 1857, the case of Dred Scott v. Sanford established

the status of slaves in the South as property.[5] Up North, the condition of the free Negro was often viewed in the same light by the populace. Blacks were considered inferior among the races of man -- fit only to live in inferior conditions and to attend inferior schools. In the 1874 case of Ward v. Flood, a California court granted that segregated schools were permissible, but that Negro children might not be excluded from the public schools in the absence of schools set aside for their use.[6] Lip service was thus given to the Fourteenth Amendment of the U.S. Constitution by the court. Its impact was that a separate school system would effectively grow to see that the races stayed segregated.

More circumventing of the newly-won rights of blacks followed. Blacks were denied the right to vote in Kentucky in the 1876 case of United States v. Reese[7] because, according to U.S. Chief Justice Morrison Waite, the Fifteenth Amendment did not apply to forcing states to give black citizens the right to vote. The amendment simply stated that a state could not deny its citizens the right to vote because of race or color. The Negro turned away from the polls had to show proof that he was turned away because of his race or color.

This reasoning was no more unusual than its sister case of U.S. v. Cruikshank,[8] where two men were indicted for being a part of a 100-man white mob which broke up

a political rally for Negroes in Louisiana. The suit claimed Fifteenth Amendment violations. The U.S. Supreme Court, using the reasoning in Reese, held that the actions of the mob were not the actions of the state of Louisiana. The Fifteenth Amendment simply prevented a state from denying its citizens the equal protection of the law. It was held not to be the government's business to look into the activities of private citizens. The implications of these rulings to the "private citizens" of both North and South soon resulted in further segregation and denial of that most basic tool of change -- the right to vote one's conscience.

State activities against blacks now began to pick up momentum. In 1878, the ruling of the Supreme Court in the case of Hall v. DeCuir[9] set aside Louisiana's 1869 act forbidding public carriers to segregate their passengers, on the grounds that it violated Congress's right to regulate interstate commerce. The Supreme Court felt that it would not be in the public interest for Louisiana to pass a law requiring a white passenger boarding the carrier outside of Louisiana to then have to share his car with "colored passengers" once he entered the state.

The concept of separating citizenship of a state from citizenship of the United States is nowhere clearer than in the opinion of Justice Miller in the Slaughterhouse

Cases[10] of 1879. Technically, the cases involved the supposed violation of the Fourteenth Amendment rights of a thousand butchers through the granting of a monopoly to one corporation in three parishes in the state of Louisiana. The opinion of the Court was that it was "not the purpose of the Fourteenth Amendment...to transfer the security and protection of... civil rights ... from the states to the federal government."[11] It was becoming obvious that the states were to be the interpreters of the concept of civil rights. The impact of this was not long in coming.

In Virginia, two Negroes charged with capital crimes were tried and convicted by all-white juries. The two Negroes claimed that discrimination had been practiced against prospective, qualified Negro jurors. They demanded that Negroes be named to their juries. The request was denied. Federal Judge Alexander Rives invoked the 1875 Civil Rights Act and claimed federal jurisdiction. The state of Virginia sued to regain jurisdiction in Virginia v. Rives[12] and won. The Supreme Court stated that the obligation to prove discrimination rested with the black defendant. Only after appeal to the state's highest court could federal suit be brought. The process was at best time-consuming and expensive, and virtually insured that a black man on trial would soon become discouraged. This ruling would completely negate another 1879 ruling in Strauder v. West Virginia[14] which struck

down a West Virginia law limiting service on juries to white males. The Virginia legislature had placed no such provision in their statutes specifically forbidding black participation on juries. The effect in the South was to virtually ignore the Strauder opinion for almost a century.[15] Even the killing and beating of Negro prisoners by an armed mob who had taken them away from a Tennessee sheriff was viewed as a state matter, not a Fourteenth Amendment violation.[16] In court or in jail, civil rights were a "state matter."

The real test of the civil rights legislation came in the famous Civil Rights Cases[17] of 1883. More than 100 test cases on the public-accomodations section of the 1875 Act were then in the courts. Segregation, as yet, was not universal -- the white community was still free to decide whom they would serve.[18] In its eight-to-one decision, the Supreme Court simply echoed its earlier decisions that the Fourteenth Amendment prohibited discrimination only by the states, not by individuals. The wrongs suffered by blacks were held to be violations of "social rights," not violations of political or civil rights by the states. The effect of the decision was to leave Reconstruction legislation an "empty vessel."[19]

In 1885 the case of Dawson v. Lee[20] held that separate tax revenues could not be levied for blacks and whites for the support of separate schools. This did not prohibit Kentucky from establishing a system of

inferior segregated schools for blacks out of a common tax fund. Indeed, the argument that the police power of the state must be reasonable and extend only to laws enacted for the promotion of the public good was put forth in the 1886 case of Yick Wo v. Hopkins.[21] The Court continually viewed itself as being supportive of both the rights of the state and those of the individual. All was done in the name of the public good. The "public good" was soon to degenerate into the infamous Jim Crow legislation which would so deeply affect the first half of 20th-century American life.

By 1890 the practice of segregation was almost as complete as it had been in the antebellum South. The coffin for civil rights was almost ready for burial, with but two nails remaining to be driven. The first came in 1890 with the case of Louisville, New Orleans, and Texas Railway v. Mississippi.[22] Mississippi declared that in 1888 it would be mandatory to establish segregation on its trains within its state borders. Setting aside its earlier decision in Hall, the U.S. Supreme Court found this law not to be in violation of any aspect of interstate commerce. Mississippi could indeed sue a railroad for not providing separate facilities for Negroes. What Mississippi did within its own borders was its own business.

The second and final nail came in 1896 when a Negro named Homer Plessy boarded a train on this same railroad

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and took a seat in a "whites only" car. When he refused to move to a "colored car," he was arrested and taken before Judge John Ferguson who ruled against his argument that the Mississippi law was in violation of the Fourteenth Amendment. The case first went to the Louisiana Supreme Court and then to the U.S. Supreme Court.

The case of Plessy v. Ferguson[23] provided a landmark in the history of segregation and the Civil Rights movement, for it marked the zenith and nadir of these concepts respectively. In citing cases all the way back to Roberts, Justice Brown carefully developed his argument that laws permitting the separation of the races do not necessarily imply the inferiority of either race. Brown went on to state that this separation is a valid exercise of the legislative and police powers of the states. Furthermore, Brown argued that in the area of civil and political rights there is not any question as to the equality of the races; but in the social arena, if one race is inferior to the other, then the Constitution of the United States is powerless to put them on an equal standing. In short, as long as racially separate facilities were equal, the concept of segregation was not discrimination. Negroes' claims to suffering were attributed to an overly fragile psychological makeup. That was "the way life was," said the Justices.[24]

The coffin was finished. Next came the gravediggers to forever bury the matter. In 1898 the infamous "grand-

father clauses" designed to disenfranchise Negroes came under fire in the case of Williams v. Mississippi. The Supreme Court again stated, as they had in Reese, that the act was O.K. — as long as it did not specifically discriminate between whites and Negroes. Mississippi had learned to write its laws and constitution the "federally acceptable" way. The result was to drop the number of black voters by 123,000 almost overnight.[26]

The question of separate schools was raised in the 1899 case of Cummings v. Richmond County Board of Education.[27] The Richmond County School Board had found it necessary to close the only all-black high school in the county to solve an overcrowding problem among younger black students. The elementary-age youngsters were given the high school building, and the high school-age youngsters were now without a school. Two white high schools existed, but they were closed to blacks. Parents of the black students took the school board to court on the basis of violation of Plessy. In brief, they claimed that the board had failed to provide equal facilities for the black youngsters.

The Court held for the school board. Again the Court refused to enter into "state matters." The Court held that schools maintained by state taxation are a state matter and federal intervention cannot be justified unless a clear case of disregard of human rights is shown. The Court felt that no such case had been shown in this

matter. Thus did the 19th century end in the field of segregated education as it had begun -- separate and unequal in an unbroken line from Roberts to Cummings.

The Plessy case has served as legal precedent for numerous similar cases throughout the first half of the 20th century. In 1902, William Reynolds, a Negro, attempted to enroll his son in an all-white school in Topeka, Kansas. In the case of Reynolds v. Board of Education of Topeka,[28] the Supreme Court of the State of Kansas told Reynolds that the board of education was perfectly within its rights to refuse his son entry into an all-white school. Over half a century would pass before another man would attempt to enroll a Negro child in an all-white school in Topeka. The results of this second attempt would forever change the course of race relations in the United States.

Not only had the door been closed on forcing the two races together in public schools, but now attempts were made to compell existing private schools, which were bi-racial by choice, to become segregated. The state of Kentucky passed a law which required that any institution could teach members of both races as long as the instruction took place simultaneously in separate classes at least twenty-five miles apart. Berea College, against whom the law was specifically directed, sued. The Supreme Court of the state of Kentucky found in the case of Berea v. Kentucky[29] that the twenty-five mile limit was a bit excessive, but otherwise the aim of the law was good.

The case went to the U.S. Supreme Court with the state of Kentucky holding the intermixing of the races to be an "evil amalgamation" and Berea College defending itself as the "promoter of the cause of Christ." Berea claimed the protection of the Constitution.

The U.S. Supreme Court disagreed. In its seven-to-two decision, the Court held the law not to be in violation of the Constitition. There was no violation of the corporate charter granted by the state of Kentucky. Had the college functioned not as a licensed corporation, which was a creature of the state, but as a private group of individuals, the matter might have been different. As it stood, however, the state of Kentucky was upheld.

From time-to-time small cracks began to develop in the wall of segregation. Little cracks, mind you; but cracks nonetheless. The Supreme Court began to change in character. New Justices brought new ideas -- new challenges to existing doctrine are often only waiting for the right opportunity to present themselves. In 1917, the first opportunity came. A challenge to Oklahoma's "grandfather clause" permanently enfranchising anyone lineally decended from a voter qualified before 1866 (regardless of their literacy) was made in 1915 on the basis that the clause was in violation of an 1871 act passed to enforce the Fifteenth Amendment. A U.S. District Court ruling in favor of the plaintiff went on appeal to the U.S. Supreme Court.

To the surprise of nearly everyone, the Supreme Court, in Guinn v. United States,[30] used the Fifteenth Amendment to strike down the state law. Oklahoma immediately passed a new law giving voting status to anyone voting in 1914 and giving others a once-in-a lifetime twelve-day period to get registered. The law stood for twenty-two years in open defiance of the Guinn ruling.[31] However, it was a start on the road back to equality before the law for blacks in America.

Still, in the matter of private dealings, the court was adamant. In the 1926 case of Corrigan v. Buckley[32] the Supreme Court handed down a decision upholding the restrictive housing "covenants" within the District of Columbia. This decision would later be used by the FHA to draft its own "model racially restrictive covenants" to perpetuate Jim Crow housing patterns. The FHA would state that its policies would be to build separate but equal facilities for the races. In practice, the promise was all theory. In 1944 Thurgood Marshall told an NAACP meeting that in Detroit all white requests for housing had been filled and 800 white units stood vacant. At the same time some 5,000 blacks were inadequately housed and no housing units were available for them.[33]

The year 1927 saw two more challenges to the classification of citizens by race. The first of these was the case of Gong Lum v. Rice.[34] The question before the court was one of "color." Were Chinese-Americans in

Mississippi "colored" or not? Bolivar County, Mississippi said that little nine-year-old Martha Lum was, and refused her entry into the white schools. Her father sued -- not as a challenge to segregated schools, but only to have his daughter classified as "white" and permitted to attend white schools. Again, the right of the state was upheld. The state would decide matters regarding the regulation of its education of the youth at public expense. A little yellow girl was "colored" and, as such, would not be permitted to attend school with white students.

The second 1927 case again challenged voting restrictions on blacks. Dr. A.L. Nixon brought suit against a Texas statute which stated that no Negro was allowed to vote in a Democratic primary election in the state of Texas. The Court, in Nixon v. Herndon,[35] held that color might not be used as a basis of statutory classification and struck down the law. The Texas Democrats turned the procedure of setting up voting qualifications over to the state executive committee of the party, rather than the state, and drafted new rules. The Nixon victory was brief.

But Nixon was persistent. With the help of NAACP lawyers, this newest tactic found its way to the U.S. Supreme Court. The decision in Nixon v. Condon[36] stated that the use of an executive committee to regulate

election procedures was a form of state action and, as such, unconstitutional. The Democrats then scrapped the committee and called a state convention instead. Nixon's attempt had failed.

The white South soon was to learn that certain rights would have to be afforded to black defendants in court. The famous case of the Scottsboro Boys went all the way to the Supreme Court.[37] The Court, appalled at the haste of the trial, ordered a new trial immediately. The second trial, although it brought out discrepencies in the story of one of the witnesses, still resulted in the conviction of the boys again. Furthermore, the exclusion of Negroes from grand and trial juries was fatally affecting the chances of black defendants. The issue would be raised again in the future -- could justice be achieved for blacks at the hands of all-white juries? The answer depended upon a basic change in American attitudes which was still many years in the future.

In 1933 a significant attempt to push an early decision in the anti-Jim Crow fight occurred when Thomas Hocutt filed an application to attend the University of North Caroline's school of pharmacy. Hocutt was rejected by an all-white university and filed suit. The case would turn upon the issue of separate, but equal -- either Hocutt could be admitted to the University of North Carolina, or North Carolina would have to provide

him and every other qualified candidate their own school of pharmacy. In the case of Hocutt v. Wilson[38] the state's attorneys found a way around the issue -- they hit upon the entrant's qualifications. Were they good enough? An examination of the plaintiff's high school record was enough. The grades were not that good. The plaintiff had difficulty with some of his words in the witness box. The president of the North Carolina College for Negroes, which Hocutt had attended, refused to cooperate. The case fell through. Too much haste and the wrong choice of plaintiff for this test case was the conclusion of the NAACP. However, one ray of hope came from the court -- the duty of the University to admit Negroes to its professional schools would not be ruled upon at this time. The issue might indeed be raised again.

1935 brought two new decisions on the rights of Negroes to sit on juries. In both Hollins v. Oklahoma[39] and Norris v. Alabama,[40] the decisions of the courts were the same -- Negroes on trial in an area could claim denial of due process if other Negroes were habitually prohibited from jury duty in that area. Another crack in the wall of segregation had appeared. It would be quickly sealed, however, in the 1936 case of Grovey v. Townsend.[41]

The Grovey case brings us back again to Texas and the acts of the Democratic party. Were the actions of the Democratic Party those of the individual or those of

the state? In the Grovey case, in spite of overwhelming evidence that the state was pulling the strings, the court effectively held that it was a party, not a state, function. The court felt that an attempt had been made to confuse "the privilege of membership in a party with the right to vote for one who is to hold public office."[42] The upshot of this case was to recognize the all-white primary as constitutional.[43] Other states soon followed the lead of Texas. Denied the right to choose the party's candidates, the effect was to disenfranchise the voter effectively at the November polls by giving him only the choices of the white majority.

1936 again saw an attempt to get Negroes admitted to all-white professional schools in the South. After the disaster in Hocutt, the group realized that any more Howard University-backed suits would have to be chosen with more care. When Donald Murray asked for admission to the law school of the University of Maryland and was turned down, the black lawyers knew that they had found their case. Murray had been refused admission on the grounds that the Princess Anne Academy, a separate facility, was available to him, along with out-of state funding if he so desired. Murray filed suit against President Pearson. The official title of the suit was Murray v. Pearson, although it became popularly known as Murray v. Maryland.[44] The charge was that Murray had been arbitrarily denied admission to the university,

although fully qualified. No state law nor university charter barred him from admission to the school. Apparently, the defense finally contended, the reason that Murray was denied admission was on the basis of race — a matter of "public policy." The defendant's attorneys, Houston and Marshall, proceeded to shoot the state's case full of holes by establishing the inferiority of the Princess Anne Academy and establishing that there was no reason for Murray to be denied admission to the University of Maryland. The presiding judge agreed and issued a writ of mandamus ordering Murray admitted to the law school. The Appeals Court upheld the decision and the state chose not to appeal any further. Murray quietly attended classes and no incidents occurred.

The impact of the case was considerable. The state of Maryland immediately began to appropriate moneys to raise the standard of black education in the state. Neighboring Virginia followed suit. Missouri soon followed with its own out-of-state funding scheme. Black morale was raised in Baltimore and membership in the NAACP rose to 1,500 by the end of 1936.[45]

The Missouri out-of-state funding plan came under attack in 1938 in the case of Missouri ex rel. Gaines v. Canada.[46] A Negro citizen sued for admission to the law school of the state university. The trustees, instead, offered him tuition money to study law in another state. The plaintiff sought a writ of mandamus to gain entry

into the university, but the Missouri courts denied his request. The U.S. Supreme Court reversed the Missouri courts on the grounds that it mattered not what other states offered, but only what opportunities Missouri was denying to its Negro citizens.

The final end to the notorious "grandfather clause" cases in Oklahoma came in 1939 with the case of Lane v. Wilson.[47] In the majority six-to-two decision, the Court held that the Oklahoma law was in clear violation of the Fifteenth Amendment The rights of the Negro, so long denied, were slowly being regained; but the fight was far from over as the 1930's came to a close.

An examination of the funding of black and white schools in the 1930's will indicate the disparity that existed between the so-called separate but equal school systems. In Randolph County, Ga., $36.66 was spent annually on each white child and 43 cents on each black child. Russell County, Ala., spent $45.74 on each white child and $2.55 on each black child. The values of educational facilities in Upson County, Ga., are equally revealing: For each dollar of declared valuation of black schools, white schools were valued at $2,055.[48]

1940 brought new lawsuits to eliminate segregation and discrimination in pay. The first of these suits was the case of Alston v. School Board of the City of Norfolk. Melvin Alston, a black teacher, was being paid an annual salary of $921 while white teachers of the same experience

received $1,200. Suit was brought by Alston and a group of black teachers. The teachers were told by the District Court that they had no right to bring such a suit and refused their petition. The case was appealed and reversed. The ruling of the Appeals Court was that the Norfolk teachers were well within their rights to band together and take concerted action -- a decision which would make such suits of this type much easier to bring in the future.

After this, the desegregation movement began to move more rapidly. Gains were made in attacking restrictive primary election practices in Louisiana (U.S. v. Classic[50]) and in ending the all-white primary in Texas (Smith v. Allwright[51]). Jim Crow-restrictions on interstate transportation on buses were lifted in the case of Morgan v. Virginia[52] in 1946, and South Carolina was forced to promise to set up a $200,000 law program for blacks in the case of Wrighten v. Board of Trustees of the University of South Carolina.[53]

Still, Jim Crow was far from dead. Open defiance was still to be found in Oklahoma in 1948 when Ada Sipuel won her case for admission to the University of Oklahoma Law School.[54] Oklahoma's answer to the U.S. Supreme Court's order was to rope off a section of the campus, assign three teachers for blacks, and call the facility a "separate but equal" school. Tokenism had been born.

The NAACP attacked the restricted covenant issue first

raised in Corrigan again in 1948 in the cases of Hurd v. Hodge[55] and Shelley v. Kraemer.[56] The Shelley decision helped to break the back of the private convenanters. According to the 1950 census, 459 more residential blocks became open to non-whites in the District of Columbia than there had been in 1940.[57] But still the right of the states to segregate had not been weakened.

1950 saw a host of cases begin the new decade, including the landmark cases of Sweatt v. Painter[58] and McLaurin v. Oklahoma State Regents for Higher Education.[59] Both cases dealt with the old problem of separate but equal facilities for training Negroes for the professions. The Sweatt case challenged the segregation policies in Texas and the McLaurin case challenged the one in Oklahoma. Both cases helped to finally open the wall of segregation in higher education and expose the whole scheme for the courts to remedy.

Sweatt had been denied entrance into the University of Texas Law School in 1946 for the simple reason that he was black. In 1946 there were no law schools in Texas for Negroes. Sweatt sued, claiming violation of the equal protection provisions of the Fourteenth Amendment. Texas attempted in 1947 to establish a separate school for blacks with four members of the university faculty and but few of the 10,000 volumes promised for the law library. The school was unaccredited. At the same time, the white law school had 19 professors and 65,000 volumes in its library. Citing the previous decisions in

Shelley and Sipuel, the U.S. Supreme Court ordered the state of Texas to give Sweatt his constitutional rights and admit him to the white law school.

The McLaurin case had the same effect in Oklahoma. McLaurin had been admitted to the Graduate College to obtain a Doctorate in Education. The university admitted him, but forced him into restrictive areas of classrooms and even prohibited him the use of a desk in the library reading room. McLaurin brought suit. The U.S. Supreme Court ordered these restrictions dropped. He was to be accorded "the same treatment at the hands of the state as students of other races."

In Delaware, suit was brought in the case of Parker v. University of Delaware.[60] In the same year, the "colored colleges" were judged to be so inferior to the white colleges in the state that the Negro plaintiffs were ordered admitted to the white university. Thus did Delaware become the first state-financed college in America to become desegregated at the undergraduate level by court order. Another pair of Delaware cases in 1952, Belton v. Gebhart and Bulah v. Gebhart,[61] begun as a simple request to get a school bus for black children, ultimately resulted in a judge ordering a segregated white public school to admit black students. It was the first breakthrough which would lead ultimately to the Brown decision of 1954.

More gains were made in 1953. In the case of District of Columbia v. John R. Thompson Co., Inc.,[62]

the Supreme Court voted to uphold an 1873 municipal statute that restaurants who were refusing to serve Negroes were breaking the law. In Bolling v. Sharpe[63] a suit was brought to attempt to obtain better schools for blacks in the District of Columbia. In this case segregation itself was attacked. The original decision in the case was that no claim upon which relief could be granted had been made. The case went to the U.S. Supreme Court on appeal. 1954 would find more suits like this one, and the outcome would change the course of the desegregation movement forever.

Contemporary Concern

At the time that Bolling was being reviewed, the U.S. Supreme Court agreed to hear four other cases (Brown v.Board of Education of Topeka, Briggs v. Elliott, Davis v. County School Board of Prince Edward County, and Gebhart v. Belton) under the title of Brown v. Board of Education.[64] Three of the cases had come to the Court on appeal from District Courts in Kansas, South Carolina, and Virginia; and the fourth came on a writ of certiorari from the Supreme Court of Delaware. All were challenges to the practice of segregation of the races as practiced by these respective states in the field of education. But these cases, unlike their predecessors, would turn upon considerations of the effects of segregation and not upon purely tangible rights or deprivations.

It was a classic study in oral arguments before the Court; and, after hearing these arguments, a decision was finally reached on May 17, 1954. The separate, but equal, doctrine of Plessy was overturned. In the second round of the case, termed Brown II,[65] the states were ordered to desegregate "with all deliberate speed." It would seem that the battle finally had been won; but the chief architect of that victory, Thurgood Marshall, knew better. Marshall was asked by another why he wasn't celebrating with the others the night of the first Brown victory. Marshall's reply was prophetic: "You fools go ahead and have your fun, but we ain't begun to work yet!"[66]

Southern reaction to the order was predictable. The feelings were probably best summed up in the "Declaration of Constitutional Principles" (known as the "Southern Manifesto") read into the Congressional Record by Southern Congressmen. The Supreme Court was accused of substituting naked power for established law, and of planting hatred and suspicion between the races. The Court was even accused of violating its own prior decisions.[67] With this attitude, progress on desegregation would be expected to proceed slowly at best.

The Supreme Court made it clear to both state governors and legislaters that their actions could not defeat the implementation of the desegregation order.

The governor of Arkansas had tried to defy the government's integration of the Little Rock School System in 1957 and was answered in his challenge by federal troops and marshals. The handwriting was on the wall.

In Cooper v. Aaron[68] the local school board tried to obtain a postponement of the order because of the turmoil and hostilities in the area. The Court would hear none of this argument. Constitutional rights could not be sacrificed to violence and disorder. Arkansas finally agreed to a one-grade-at-a-time desegregation plan for its schools.

It was not until 1963 that any cases on specific implementation plans to meet the desegregation order were decided by the U.S. Supreme Court. Then came the case of Goss v. Board of Education.[69] An attempt was made in a "transfer plan" to allow a student to transfer from a school where he would be in a racial minority back to his old school. The Court held that this would result inevitably in re-segregation and held the plan to be unconstitutional.

One of the instruments chosen to implement the Brown decision was the Civil Rights Act of 1964. The two most significant Titles of the Act were designed to put teeth into the desegregation movement through the control of federal funds for education. Under Title IV, HEW would now monitor desegregation efforts; assistance would be provided to districts attempting to desegregate; and

the Attorney General would now serve as the citizens' instrument for bringing lawsuits against districts still practicing discrimination. Title VI stated that discrimination practices would result in withdrawl of federal funds from educational programs. Appealing to the district's pocketbook is often more effective than appeal to their collective consciousness.

Finally, the concept of "all deliberate speed" -- viewed as a joke in the South -- ran out. Prince Edward County, Virginia, had closed its public schools to deny Negroes the equal protection of the law. Private schools established in their place were being funded by the state. The Court put a stop to this practice.[70] Again, in 1965, an attempt to prevent Negro students from taking courses offered only in a high school limited to whites was defeated.[71]

When the "transfer plan" failed in the South, a new gimmick arose to take its place -- the "freedom of choice plan." In Green v. County School Board of New Kent County[72] in 1968, the Supreme Court ordered the board to come up with a realistic plan which would work immediately. Should freedom of choice prove to be inferior to any other method of desegregation, then freedom of choice would be unacceptable. In Alexander v. Holmes County Board of Education[73] Mississippi's dual school system was ordered to terminate and be replaced by a unitary school system only.

With the orders now out to desegregate immediately,

questions appeared as to the legality of the methods chosen. Busing became a central issue. By 1969-70 thirty-nine per cent of all public school children were being bussed.[74] Busing was judged to be a valid tool of desegregation in the case of Swann v. Charlotte-Mecklenburg Board of Education[75] in 1971. The Court added that future construction must not be used as a tool to re-introduce segregation into the school system. Finally, the Court held that no year-to-year adjustments need be made once a school system demonstrates that an affirmative action to desegregate has been accomplished. This landmark case may be thought of as the effective end to de jure segregation suits in the South.

In the North, matters have proceeded more slowly. Zoning practices of the school board of Denver, Colorado, were judged to be the basis of the desegregation suit in the 1973 case of Keyes v. School District No. 1, Denver, Colorado.[76] The Court emphasized that unless a "separate, identifiable, and unrelated" unit of the school district was segregated because of geographic structure or natural boundaries, and the action was the result of "racially inspired school board actions," then the entire school system had to be desegregated.

Whether to involve the so-called "white suburbs" in a desegregation plan was ruled on in the case of Milliken v. Bradley.[77] The Court held that districts surrounding the segregated district would not have to be involved in

the plan if those districts were not themselves involved in the discriminatory acts. District lines would have to be respected. Exactly to what extent governmental involvement stops in the process of "racially inspired actions" will be the point upon which the case of United States v. Board of School Commissioners of the City of Indianapolis will eventually be decided.[78]

The question of whether there exists a legal duty to correct de facto segregation must, at present, be answered negatively. Certain educational inequalities in terms of tangible deficiencies may be corrected under court order, but not on the grounds of racial equality. The future may hold a more favorable outcome in matters of this sort.

Summary and Future Considerations

In the area of housing, segregation still persists. Examination of demographic data since 1970 indicates that there exists no evidence of any sharp shifts in the residential isolation of blacks. Even in the suburbs, the trend has been to follow the central-city segregation of blacks. Black "invasions" of neighborhoods and white "flight" from the central cities are distorted concepts characteristic of only about two dozen cities. The eight-to-one majority of whites in the population, coupled with the concentration of the black population in the aforementioned two dozen cities, virtually assures their remaining but

a small minority in the other 200 metropolitan districts of this country. Changes in this condition will depend heavily upon reductions in the practice of segregation in the sale of housing in this land.[79]

Considerable desegregation has already taken place in the nation's schools as a result of the actions taken in the 1960's. The sharpest gains, of course, have come in the South. The percentage of black children in all-black schools has declined from 40 per cent in 1968 to 12 per cent in 1971, while the percentage of blacks in all-white schools has risen from 18 per cent in 1968 to 44 per cent in 1971.[80] Indeed, of all the areas in the country, the South exhibited the lowest degree of racial segregation in 1972.[81]

According to the National Opinion Research Center's results published in Scientific American, 30 per cent of all Americans favored integration in 1942. The percentage rose to 75 per cent by 1970. In the South, the trend of the whites in the South favoring integration has risen from 2 per cent in 1942, to 14 per cent in 1956, to almost 50 per cent in 1970.

Social class integration has proven of value in raising academic achievement among blacks. The results of the "Coleman Report" pointed out that integration for minority students cannot generally be achieved without racial and ethnic integration.[83] Further studies have shown that there is no loss of white achievement under

desegregation plans and their implementation. Yet minority pupils are conversely harmed by segregation -- their aspirations are restricted and their confidence is much lower. Segregation tends to instill in blacks fear, dislike, and avoidance of whites.[84] The benefits are obvious -- the neglect is criminal.

Still many unfullfilled remedies to desegregation remain to be handled -- open housing, minority hiring, minority business, guaranteed annual income, etc., are not being pushed any harder now than they were when they were first proposed. The nation's schools have been left the primary task of the redressing of imbalances among the races -- much to the chagrin of sociologists and educators alike.[85]

Major problems still remain. The 1977 reports of the Advisory Committee of the U.S. Commission on Civil Rights has listed 15 major civil rights issues still unsolved Among these are: 1) education, 2) employment, 3) women's interests, 4) special groups (blacks, etc.), 5) housing, 6) civil rights enforcement, 7) indigenous groups (American Indians, etc.), 8) prisons, 9) police-community relations, 10) economic issues, 11) voting and political participation, 12) communications, 13) migrants, 14) health and safety, and 15) undocumented aliens.[86] Desegregation now affects many new areas not originally covered in the first civil rights actions. The process

has indeed been continuous and self-perpetuating -- the impact on the public has had repercussions far beyond what had been expected.

Thomas Pettigrew[87] has taken a look into the future and has looked on into the 21st century to view the impact of race relations on America. Pettigrew first points out that race relations actually fall into two processes. The phase affecting the young middle class is a positive reflection upon the gains made since 1954. The other process is that affecting the old and the poor — a negative reflection of the country's past failures. Both processes must be viewed together to understand the effect of race relations and minorities on American life styles.

By the year 2000, increasing numbers of blacks and other minorities will join middle class whites in more comfortable lifestyles, while larger numbers will continue to suffer from economic deprivation and racial discrimination. Racial problems will become increasingly more economic problems -- welfare will soon outweigh status goals. Busing is seen to be a dead issue by 2000 -- replaced by new problems of "metropolitanism" and greater income equality demands. Minorities will probably increase their demands for change, while whites will reduce their opposition to change.[88]

How accurate these predictions will be depends upon many factors. All Americans will have to accept a commitment to the future, just as all those who have come before us

have had to do. Failure to commit the country to affirmative action could undo all the good work which has taken so long to get underway. Once the benefits of desegregation are discovered through continued interaction between the races, this commitment will become as natural as its advocates have so long argued that it should be. Perhaps this time they will be heard by a larger and more sympathetic audience....

End Notes

[1] 5 Cushing Reports 198 (1849).

[2] Richard Kluger, Simple Justice, New York, Alfred A. Knopf, 1975, at 75.

[3] Roberts v. City of Boston, 59 Mass. 198, 206 (1850).

[4] Id.

[5] 19 Howard 393 (1857).

[6] 48 Calif. 36 (1874).

[7] 92 U.S. 214 (1876).

[8] 92 U.S. 485 (1875).

[9] 95 U.S. 485 (1878).

[10] 16 Wallace 36 (1879).

[11] Id.

[12] 100 U.S. 313 (1879).

[13] Kluger, at 64.

[14] 100 U.S. 303 (1879).

[15] Kluger, at 63.

[16] United States v. Harris, 106 U.S. 629 (1883).

[17] 109 U.S. 3 (1883).

[18] Kluger, at 65.

[19] Id.

[20] 83 Ky 49 (1885).

[21] 118 U.S. 356 (1886).

[22] 133 U.S. 587 (1890).

[23] 163 U.S. 537 (1896).

[24] Kluger, at 81.

[25] 170 U.S. 213 (1898).

[26] Kluger, at 67.

[27] 175 U.S. 528 (1899).

[28] 66 Kans. 672 (1902).

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[30] 238 U.S. 347 (1915).

[31] Kluger, at 104.

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[44] 182 A. 590 (1936).

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[47] 307 U.S. 268 (1939).

[48] "Fulfilling the Letter and Spirit of the Law," Washington, D.C., U.S. Commission on Civil Rights, Aug., 1976, at 2.

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[53] 328 U.S. 373 (1946).

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[55] 334 U.S. 24 (1948).

[56] 334 U.S. 1 (1948).

[57] Kluger, at 255.

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